IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-2055

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

vs.

JAMES C. BARBOUR, RECEIVER and SECURITIES AND EXCHANGE COMMISSION,
Respondents.

## BRIEF IN OPPOSITION

To Petition for Writ of Certiorari

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**To Petition for Writ of Certiorari**

Respondent, James C. Barbour, Receiver for Guaranty Bond and Securities Corporation ("Guaranty") opposes the Petition for a Writ of Certiorari in this cause because the United States Court of Appeals for the Sixth Circuit correctly decided the issues on appeal and there is no compelling reason why its decision should be reviewed by this Honorable Court.

## PRELIMINARY STATEMENT

The principal holding of the Court of Appeals was that the Securities Investor Protection Act ("SIPA") is applicable to a registered broker-dealer conducting normal business operations on the effective date of the Act even though there was then pending an injunction action by the Securities and Exchange Commission and the registrant had been in financial difficulty and in violation of the Commission's "Net Capital Rule" for many months.

Yet, petitioner "reserves" discussion of this issue and bases its Petition upon the necessity for a pronouncement by this Court as to whether or not a private enforcement action is authorized by the Act, whether the United States District Court for the Middle District of Tennessee had *in personam* jurisdiction over it and whether its intervention would be feasible at this stage of the receivership proceeding.

These questions did not appear to be of such paramount importance in the courts below. While petitioner's answer in the District Court raised seven (7) affirmative defenses, the last of which was

> "38. This Court lacks jurisdiction in this proceeding."

it was not alleged that the Act afforded no private cause of action and there was some indication that the question as to the receiver's standing and the *in personam* jurisdiction of the Court was being waived:

> "We don't think the receiver has standing, and the reasons are set forth, but for the purpose of resolving the merits of this problem in this case and only for the purpose of this case, as we stated in our memorandum, we are prepared to waive the objection for this case only,

because we do want to get to the problem and get rid of it once and for all, as you do, Your Honor, and as they do.

"So, for the same reasons, while we think there is substantial objection to the jurisdiction of this Court over the person of SIPC, since we have the capacity to waive that objection, we do, provided this matter goes on, and I mean provided as a normal litigated civil case.

"What we don't waive, because we can't waive, is the substantial question in our view of this Court's right to entertain this proceeding at all. If there is a defect in this Court's jurisdiction, which is other than a defect in terms of personal jurisdiction, it has to be resolved."

> Statement of Wilfred R. Caron, petitioner's Associate General Counsel, in the United States District Court on June 7, 1972, page 94 of Appendix filed in Court of Appeals.

The District Court nevertheless ruled on "Personal Jurisdiction" and "Subject Matter Jurisdiction" adversely to petitioner but no cross-appeal was taken. While the Court of Appeals discussed briefly petitioner's challenge to the receiver's standing, it dealt with the attacks on jurisdiction—both subject matter and *in personam*—in a footnote in which it simply adopted the District Court's disposition of these contentions.

It may also be noted that in *Lohf v. Casey*, 466 F.2d 618 (10th Cir. 1972), an action instituted by a trustee in bankruptcy, there is no indication in either the opinion of the trial court (330 F.Supp. 356) or that of the Court of Appeals that petitioner raised any question as to the standing of the trustee, the authorization for a private cause of action or either the subject matter or *in personam* jurisdiction of the Court.

## ARGUMENT

### I. Customers of an Insolvent Member of SIPC Are Entitled to Demand Protection Under the Act Where Both the Commission and SIPC Have Failed or Refused to Discharge Their Obligations.

On February 2, 1971, only four (4) days after the entry of the Order appointing James C. Barbour as Receiver for Guaranty and certain related companies, the Atlanta Regional Office of the Commission sent information to its headquarters in Washington D.C. on the circumstances of Guaranty, but for some reason this information was not conveyed to SIPC.[1] The receiver proceeded to address himself to his obligations to the customers of the broker-dealer, conducting an audit to identify and determine the ownership of securities in the face amount of some Sixteen Million ($16,000,000.00) Dollars and undertaking to devise and submit to the Court in accordance with its instructions a recommendation for appropriate steps "to protect the diversified interests of religious institutions for which said corporations have been acting as underwriter . . ."

Realizing in early May 1971 that nothing had been heard from either the Commission or SIPC, the receiver instructed his attorney to review the Act and take appropriate steps to obtain its benefits if they were available. On May 27, 1971, the latter wrote to the Chairman of SIPC which constituted its first notice of Guaranty's condition and the pending proceedings.

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[1] In the District Court, counsel for the Commission stated that he was not able to determine "whether it got lost . . . or whether some lower staff official believed that SIPC intervention wasn't necessary in this case . . ." SIPC counsel stated that it was his understanding, "which is imperfect, because I wasn't at SIPC at the time, but it is my understanding that there was a conscious decision made by somebody, whose name I don't have in my mind right now, at the Commission to the effect that this Act had no application in this." (App. pp. 88, 92).

During the next several months, petitioner obtained a report from the Commission and voluminous materials from the receiver but gave him no indication as to its position with reference to the applicability of the Act. Finally, on September 23, 1971, the receiver's attorney wrote again to the Chairman of SIPC inquiring as to its decision. SIPC's general counsel replied on October 5, 1971 that, while it still did not have certain information which would be helpful, "based on information presently available, this Corporation has no plans for filing an application for the appointment of a Trustee in this proceeding." After further exchanges of correspondence as to SIPC's reasons for declining to intervene and the investigation of receiver's counsel into the circumstances of the Commission's failure to notify SIPC of the condition of Guaranty and also the manner in which jurisdiction was invoked in *Lohf v. Casey* (supra), the receiver filed his Petition seeking a show cause order to require both the Commission and SIPC to indicate why the benefits of the Act should not be made available to Guaranty's customers.

The very recital of the foregoing circumstances demonstrates the necessity for a private cause of action in order to achieve the stated purpose of the Act, i.e. the protection of securities investors. We still do not know whether the Commission's failure to notify petitioner of Guaranty's condition was due to an oversight or a deliberate decision. Since the Commission has taken the position throughout this proceeding that the Act was applicable to Guaranty, and since it had a statutory duty to notify petitioner in any event, and since in February 1971, the receivership proceeding had just been initiated, it must be assumed that the Commission's failure was inadvertent. Yet it has still taken no steps to require SIPC to assist Guaranty's customers.

Petitioner cites numerous cases but relies most heavily upon the Amtrak decision, *National RR Passenger Corp. v. National Association of RR Passengers*, 414 U.S. 453, 38 L.Ed.2d 646

(1974). The distinctions between that case and this one are conclusive.

There was a sharp difference of opinion among the litigants and the courts as to whether or not railroad passengers were the intended beneficiaries of the Amtrak Act. There can be no dispute that Congress enacted the Securities Investor Protection Act for the primary and virtually exclusive benefit of securities investors.

The Amtrak Act provided specifically for one type of private cause of action and the language, by implication excluded any other private causes of action. The SIPA, on the other hand, is silent on the subject except that SIPC was granted the power:

> "(1) To sue and be sued, complain and defend in its corporate name and through its own counsel, in any court, state, or federal."
>
> Section 3(b), 15 U.S.C. § 78ccc(b).

The legislative history of the Amtrak Act indicated Congress's rejection of a proposal to amend Section 307(a) so as to permit any aggrieved party to institute legal proceedings for violations of the law. The legislative history of SIPA contains nothing to suggest that the question of private causes of action was considered, pro or con, at any time.

This Court found that to construe the Amtrak Act to permit private causes of action, except in cases involving labor agreements, would tend to frustrate one of the principal objectives of the Act, namely, to provide an efficient means whereby Amtrak could eliminate uneconomic routes without the necessity of submitting to the time-consuming proceedings of State regulatory bodies or the Interstate Commerce Commission. We fail to see how the allowance of a private cause of action by securities investors can frustrate the principal objective of SIPA,

i.e. the protection of such investors, even though it may cause inconvenience, annoyance and additional labor for SIPC.

We feel that the decision in *J.I. Case Co. v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964) is more apt. There a unanimous court held that Federal courts have the power to grant all necessary remedial relief in a stockholders suit for violation of Section 14(a) of the Securities Exchange Act of 1934. It was contended that Congress made no specific reference to a private right of action in Section 14(a) but the Court replied:

> "While this language makes no specific reference to a private right of action, among its chief purposes is the 'protection of investors,' which certainly implies the availability of judicial relief when necessary to achieve that result."
>
> 12 L.Ed.2d 427.

The Court further observed that:

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action."
>
> 12 L.Ed.2d 427.

In the later case of *Allen v. Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817, *Borak* was summarized as follows:

> "We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action."
>
> 22 L.Ed.2d 12.

It is interesting to note that in *Allen*, this Court emphasized that the statute provided that the attorney general "*may* institute . . . an action" or "*may* . . . file . . . an application for an

order." (22 L.Ed.2d 12). Section 7(b) of SIPA likewise provides that "the Commission *may* apply . . . for an order . . ." (15 U.S.C. § 78ggg) (Emphasis added).

We, therefore, respectfully submit that the Court of Appeals determined this issue in accord with previous decisions of this Court and its decision need not be reviewed.

## II. Neither the District Court Nor the Court of Appeals Has Yet Ruled as to Specific Questions Involving Implementation of the Act.

Petitioner seems to be preoccupied with the sanctity of the liquidation procedure prescribed by the Act and to place a slavish devotion to this procedure above any concern it may have for the protection of securities investors. Because the receivership has proceeded to advanced stages and because the receiver has succeeded in minimizing the losses of Guaranty's customers, petitioner argues that it should not be required to have anything to do with the case.

Of course, if the Commission had notified petitioner in early February 1971, and if petitioner had acted promptly, the receivership proceeding could have been succeeded by an SIPC liquidation at that time. Be that as it may, however, the Court of Appeals has done no more than to remand this case "to the district court for processing consistent with (its) opinion and specifically to determine and enforce any rights of Guaranty's customers under the SIPA."

It remains for the District Court to now determine what rights the customers have under the Act and in what manner they may be protected. Petitioner will have a full opportunity to present its views on these issues in light of its interpretation of the Act. It will not do to say, however, that simply because

the receivership proceeding has progressed to its late stages and it appears that the loss to customers may not be considerable, petitioner should be relieved of the statutory obligation to such customers which Congress placed upon it. The Act authorizes protection of customers of members of SIPC "notwithstanding the pendency . . . of any . . . equity receivership proceeding . . ." (Section 5, 15 U.S.C., § 78eee(a)(3)(B)).

We, therefore, respectfully submit that the implementation of the Act in this case is a matter which has not yet been reached by the lower courts and, consequently, cannot be reviewed by this Court.

## III. There Is No Compelling Reason to Review the *In Personam* Jurisdiction of the District Court.

It would appear that this issue was effectively waived in the District Court, that no cross-appeal was perfected as to the Court's ruling, and no great importance was attached to it in the Court of Appeals.

The significant question here is the applicability of the Act and if it was correctly decided by the Court of Appeals, it would serve no good purpose to require the receiver to reinstitute the action in the District of Columbia. Admittedly, there was no proof introduced in the hearing under the show cause order as to petitioner's activities within the Middle District of Tennessee, but the requirement for such proof was clearly dispensed with by the statement of petitioner's counsel in open court, quoted hereinabove.

The language of Section 3(b) of the Act permitting petitioner to be sued "in any court, State, or Federal" implies that Congress did not intend that securities investors from all over the country would be required to come to Washington in order to seek the protection of the Act.

## CONCLUSION

For all of the above reasons, Respondent, James C. Barbour, Receiver, insists that the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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